

## Legislative Suggestions: Needed Property Legislation in Wisconsin

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## LEGISLATIVE SUGGESTIONS

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### NEEDED PROPERTY LEGISLATION IN WISCONSIN

BY CARL B. RIX.

Our courts are continually calling the attention of the legal profession to needed legislation and it is the purpose of this article to suggest remedial legislation sorely needed in the State of Wisconsin.

This is an age of accumulation of great wealth, principally in the many forms of personal property. The growth of fortunes during the decade, and particularly within the last two years, expressed in figures would be interesting and illuminating, but such figures are not necessary in this article. General knowledge will prove sufficient for our purposes. Coupled with the growth of fortunes goes the inevitable desire for the makers of such fortunes to perpetuate them in their families. For centuries such perpetuation has been held to be against public policy and the result of that feeling has been expressed in probably the greatest example of judicial legislation, known as the Rule Against Perpetuities. Every student recalls the difference between the rule of remoteness of vesting and suspension of alienation. That expression of public policy was developed principally as applied to real property because of the relatively greater importance of real than personal property. Furthermore every state in this country has expressed that public policy in its constitution or statutes. The rule in regard to real property is found in Sections 2038 and 2039 of the Revised Statutes of Wisconsin. Section 2038 is as follows: "Every future estate shall be void in its creation which shall suspend the absolute power of alienation for a longer period than is prescribed in this chapter; such power of alienation is suspended when there are no persons in being by whom absolute fee in possession can be conveyed." Section 2039 is as follows: "The absolute power of alienation shall not be suspended by any limitation or condition whatever for a longer period than during the continuance of two lives in being at the creation of the estate, and twenty-one years thereafter, except in the single case mentioned in the next section, and except when real estate is given, granted or devised to a charitable

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use or to literary or charitable corporations, which shall have been organized under the laws of this state for their sole use and benefit, or to any cemetery corporation, society or association."

Fourteen years ago in *Becker vs. Chester*, 115 Wis. 90, the Supreme Court of Wisconsin held that there is no statutory or common law rule against perpetuities of personal property in this state, and that there is nothing to prevent a man from tying up his personal property for all time to come. For our purpose it is not necessary to enter into the famous controversy in which Justice Cassoday so vigorously expressed his dissent. It is not necessary either to discuss the merits of the majority decision or to decide whether or not the decision of the court was clearly obiter as contended by Justice Cassoday. As that decision has been approved in other cases since *Becker vs. Chester*, this state is definitely committed to the rule that there is no statute to prevent a perpetuity in personal property in Wisconsin, and that the common law as to perpetuities respecting such property is not in force in this state. With that situation before us it is necessary that we heed the words of the dissenting justice when he says: "While I have no doubt that my brethren have made the ruling here complained of in pursuance of a sense of duty, nevertheless I have been constrained to write this separate opinion in which I have attempted, in a respectful manner, to expose what I regard as a legal monstrosity in the hope that the legislature may do something to relieve the State of Wisconsin from being the only state in the union where personal property may be given in trust for private purposes and rendered unalienable for all time."

Will it take the will of one of our wealthy citizens, who ties up his huge estate in personal property for an indefinite period in the future to cause us to ask the legislature to correct this apparent evil?

The statutes of Wisconsin in regard to real property were adopted from those of New York. The statutes of that state provide as follows:

1. The absolute ownership of personal property shall not be suspended by any limitation or condition whatever for a

longer period than during the continuance and until the termination of not more than two lives in being at the date of the instrument containing such limitation or condition; or, if such instrument be a will, for not more than two lives in being at the death of the testator.

2. In all other respects limitation of future or contingent interests in personal property shall be subject to the rules prescribed in the first chapter of this act in relation to future estates in lands.

It is clear that this situation should be promptly remedied by the adoption of legislation substantially similar to that of New York. A provision in the will to convert realty into personalty can put all of a man's property into a perpetuity and increases the danger many fold. Concerted action to remedy this situation is absolutely imperative and the duty to act rests upon the members of the bar through the proper associations. The people of the state are entitled to look to the legal profession for guidance in such matters as these and it will be pure luck, after fourteen years of neglect, if remedial legislation is obtained preventing any odious and harmful perpetuities.

It was Bacon who said "the law favors three things, life, liberty and dower." It is remarkable that this provision for the widow, known as dower, has come down through the years practically unchanged except where other and more ample provision has been made as in the case of community property. The courts have been zealous to protect and safeguard this right. The marked freedom of change in the essentials and requirements of dower is shown by the fact that one of the feudal rules of property, the necessity of seizing of an estate, has come down with it, and the husband today must be seized of an estate of inheritance to entitle the wife to dower.

At the time of the passage of the Statutes of Uses in 1535 curtesy and dower could not be had of equitable estates. The manifest advantages of that statute were so great in spite of its perversion by the rules that a use could not be raised upon a use and that the statute did not apply to active trusts, that the courts of equity were quick to allay some of the feeling against equitable

estates by permitting the equitable rights to be taken for debts and by granting curtesy in such estates. But no change was made in the rule as to dower in such estates. No doubt the rights of mere woman were not then claiming the careful attention of courts and legislatures with the results so ably described in another article of this issue. In due time this situation was remedied in England and dower was granted in equitable estates. For years it was taken for granted in Wisconsin that the right of dower attached to all estates, legal or equitable.

In the case of *Will of Prasser*, 140 Wis. 92, the question arose as to the right of a widow of a holder of a vested remainder to dower in such remainder. The court gave the use of the property to the wife for life and after her death the executors were to hold the estate in trust for ten years with active trust duties, and at the expiration of the ten years all of the property was devised and bequeathed to all the children in equal parts. The widow died and one of the sons died, leaving a widow and one minor child. The court held that the remainders were vested and then passed on to the consideration of the question of dower, and the court says: "At common law there was no dower right in a reversion or remainder after a freehold estate, unless the freehold estate terminated during the life of the husband; but there was dower in a reversion or remainder after an estate for years. 1 Washb. R. P. 6th Ed. par. 365. At common law also there was no dower in an equitable estate. The husband must have had legal title. *Id.* par. 374. In England and in many of the states in this country this latter rule has been changed by statute, and dower given out of equitable estates. *Id.* par. 375. Our statute, however, says nothing of equitable estates and doubtless is to be regarded as simply giving dower out of legal estates, as was the case at common law, Sec. 2159 Stats. 1898; 1 Scribner, Dower, Ch. 19, par. 20 et seq. p. 400."

Plainly the estate during the ten year term was equitable and the court proceeded to find a way out by applying Section 2087, R. S. of Wisconsin, which declares that the grantee of an equitable estate shall have a legal estate in the lands as against all persons, except the trustees and those lawfully claiming under them. The court says "Such was Theodore Prasser's interest here. It was vested, subject only to the execution of

the trust, and was a legal estate as against all persons except the trustees whose term was for years only. Why should not his widow have dower in this legal estate?"

It was only a short time before the bad penny returned. In the case of *Harley vs. Harley*, reported in the same volume, 140 Wis. p. 282, the question again arose as to the right of dower in an equitable estate. The husband died, having fully completed a contract of purchase of realty thereby acquiring the equitable title, but the legal title had not been conveyed to him. The court says at page 288: "The question of whether a widow is entitled to dower in real estate of which her husband dies possessed of only a mere equitable title has been recently considered and resolved in the negative by this court in *Will of Prasser*, ante p. 92. It was there said that an estate of inheritance, as the term is used in the statute, is just what such term signifies at common law, consequently that the statute gives dower only out of legal estates. But where the husband dies seized of the full equitable title and the owner of the whole beneficial interest with only the mere legal title outstanding, and the person having no duty to perform in respect to the property, as in this case, but to convey it to the equitable owner, the estate is to all intents and purposes a legal estate,—an estate of inheritance within the meaning of the statute, in which the wife is entitled to dower. \* \* \* It is in harmony with the doctrine of this court that the dower right is to be favored in the law (*Munger vs. Perkins*, 62 Wis. 499) and the better rule as we are constrained to believe. If the statute will reasonably permit of a construction which will save the dower right and also one which will defeat it, and there is uncertainty as to what was in the mind of the law-makers when it was adopted, the former should prevail. At such time as now, such interest in real property as that of which appellant's husband died possessed, was regarded as realty; an estate of inheritance in the broad sense of the term, which passes to the heirs and to which the homestead right attaches. We are entirely satisfied with the decision recently rendered, treating a full equitable title and ownership of the entire beneficial interest in realty a right to be immediately clothed with the legal title, as here, as substantially a legal estate and within the meaning of the dower statute."